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Constitutional Law

Donald T. Kramer, J.D.

IV. Construction of Constitutions [§§ 60–108]

D. Construction to Determine Operative Effect [§§ 95–108]

1. As Mandatory or Directory [§§ 95–97]

Topic Summary Correlation Table References

§ 97. Particular constitutional language—"Shall" or "may"

The use of the word "shall" in a constitutional provision is generally considered as an indication of the mandatory character of the provision,[39] although the word "shall" may receive a permissive interpretation when necessary to carry out the true intent of the provision in which that word is found.[40] Thus, use of the word "shall" is not always conclusive.[41]

Permissive constitutional language, such as the word "may," is usually treated as intended in fact to be merely permissive.[42] Accordingly, the word "may" should not be construed as "shall" in a constitutional provision, unless from the whole context the purpose plainly appears to be mandatory,[43] although occasionally the word "may" has been interpreted to mean "shall" or "must." [44] Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the provision in question. For instance, it seems to be the uniform rule that where the object of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large—that is, where the public interest or a private right requires that the thing be done—then the language, though permissive in form, is peremptory.[45]

[FN39] Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613, 141 A.L.R. 894 (1942); People v. DeJesus, 21 A.D.2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943), appeal dismissed, 322 U.S. 717, 64 S. Ct. 1288, 88 L. Ed. 1558 (1944); Stubbs v. State, 216 Tenn. 567, 393 S.W.2d 150 (1965); McMurdie v. Chugg, 99 Utah 403, 107 P.2d 163, 132 A.L.R. 435 (1940).

[FN40] Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960); Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927).

[FN41] Canyon Public Service Dist. v. Tasa Coal Co., 156 W. Va. 606, 195 S.E.2d 647 (1973).

[FN42] State ex rel. Lourin v. Industrial Commission, 138 Ohio St. 618, 21 Ohio Op. 490, 37 N.E.2d 595 (1941) (overruled by, Caruso v. Aluminum Co. of America, 15 Ohio St. 3d 306, 473 N.E.2d 818 (1984)).

For purposes of statutory and constitutional construction, the word "may" ordinarily signifies permission and generally means that the action spoken of is optional and discretionary. State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

[FN43] State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906).

[FN44] Robison v. Payne, 20 Cal. App. 2d 103, 66 P.2d 710 (3d Dist. 1937).

[FN45] Mundell v. Lyons, 182 Cal. 289, 187 P. 950 (1920).

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